No. 80-1796

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In the Supreme Court of the United States

OCTOBER TERM, 1980

SOTERIOS HANTZIS AND CATHARINE HANTZIS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether the court of appeals correctly held that petitioner Catharine Hantzis, a student at the Harvard Law School during the year in issue, could not deduct under Section 162(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) the transportation, food and lodging expenses she incurred while working as a summer law clerk in New York City.

The pertinent facts may be summarized as follows: In 1973, petitioner and her husband[1] moved from California to Boston, Massachusetts. Petitioner's husband obtained a teaching position at Northeastern University in Boston, and in the fall of 1973 petitioner enrolled as a full-time student at the Harvard Law School. During her second year of law

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[1]References to "petitioner" are to Catharine Hantzis. Soterios Hantzis is a party solely because he filed a joint income tax return with his wife for the year at issue.

school, she sought unsuccessfully to obtain employment for the summer of 1975 with a Boston law firm. She therefore obtained a job as a clerk with a law firm in New York City, where she worked for 10 weeks. Her husband remained in Boston during the summer (Pet. App. A-1 at 1-2).

On their joint income tax return for 1975, petitioner deducted the cost of her initial transportation from Boston to New York City, the cost of her return transportation to Boston at the end of the summer, and the cost of her meals and lodging incurred while living in New York. On audit, the Commissioner of Internal Revenue disallowed those deductions, aggregating approximately $3,204, on the ground that they were not incurred away from home in the pursuit of a trade or business within the meaning of Section 162(a)(2) (Pet. App. A-1 at 2).

The Tax Court upheld petitioner's claimed deductions. In so holding, the court relied on the fact that petitioner's employment was expected to last only 10 weeks. It concluded that, for purposes of Section 162(a)(2), her "tax home" was in Boston, and that she was "away from home" within the meaning of the statute. The Tax Court also found that petitioner's summer expenses were incurred in the pursuit of a trade or business (Pet. App. A-3).

The court of appeals reversed. Observing that the meaning of the term "home" in Section 162(a)(2) depends on the facts of each particular case, and that its definition is "not simply pinioned to one of two competing definitions of home" (Pet. App. A-1 at 10, 13), the court of appeals ruled that for purposes of Section 162(a)(2), petitioner's home was in New York City. The court further found that petitioner maintained her residence in Boston solely for personal considerations. It therefore rejected petitioner's argument that the expenses were deductible because her employment was temporary. The court reasoned (Pet. App. A-1 at 15) that the "temporary employment doctrine * * * has no

application where the taxpayer has no business connection with his usual place of residence." Accordingly, the court held that the expenses were not deductible.

1. The court of appeals correctly held that petitioner could not deduct her transportation, lodging and meal expenses incurred while working in New York City. Section 162(a)(2) of the Internal Revenue Code allows a deduction for reasonable and necessary traveling expenses, including amounts expended for meals and lodging, incurred while away from home in the pursuit of a trade or business. *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). Personal expenses, on the other hand, are not deductible. Section 262 of the Code. Cases under Section 162(a)(2) therefore generally turn on the questions (1) whether the expenses were incurred while "away from home," and (2) whether the expenses were incurred in the pursuit of a trade or business.

Here, the court of appeals stated "that the 'while away from home' requirement has to be construed in light of the further requirement that the expense be the result of business exigencies" (Pet. App. A-1 at 11). The court found that petitioner's trade or business did not require that she maintain a home in Boston as well as one in New York City. Her trade or business required her only to maintain a home in New York where she worked, and she maintained her residence in Boston solely for personal reasons. Accordingly, the court correctly concluded that "her home for purposes of section 162(a)(2) was New York and that the expenses at issue in this case were not incurred 'while away from home' " (Pet. App. A-1 at 13). In accord with the decision below, the only other court of appeals that has considered the question whether a full-time college student can deduct summer employment expenses has likewise rejected the taxpayer's claim to an "away from home" deduction under Section 162(a)(2). *Commissioner* v. *Janss*, 260 F. 2d 99 (8th Cir. 1958).

The court of appeals correctly held that the temporary employment doctrine generally has no application where the taxpayer has no business connection with his usual place of residence. Ordinarily, if a taxpayer maintains a home near the location of his regular trade or business and temporarily relocates, the additional expenses incurred as the result of maintaining a second home are deductible. The temporary employment doctrine, however, does not purport to eliminate any requirement that the continued maintenance of a first home must have a business justification. Petitioner never had a business need for maintaining her home in Boston. Her decision to maintain two homes was prompted solely by personal considerations. Accordingly, the temporary duration of her employment in New York has no bearing on the application of Section 162(a)(2).

2. Contrary to petitioner's argument (Pet. 14), the decision below does not conflict with either *Frederick* v. *United States*, 603 F. 2d 1292 (8th Cir. 1979), *Wright* v. *Hartsell*, 305 F. 2d 221 (9th Cir. 1962),[2] or *Harvey* v. *Commissioner*, 283 F. 2d 491 (9th Cir. 1960). Petitioner cites these cases (Pet. 14-15) for the proposition that a trade or business connection with the first home is not necessary to the application of the temporary employment doctrine. But it is clear that the taxpayers involved in those cases had a trade or business near the location of their first home. Indeed, the district court in *Frederick* stated that "a deduction will be allowed under §162(a)(2) only when a taxpayer has an established *principal or usual place of employment* and he incurs travel expenses while temporarily employed elsewhere." 457 F. Supp. 1274, 1280 (D.N.D. 1978) (emphasis added). The scope of the temporary employment exception

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[2]The Ninth Circuit in *Wright* v. *Hartsell, supra*, did not address the temporary employment issue. There, the court allowed a deduction in part because the taxpayer could not live close to the Atomic Energy Commission test site where he worked.

was not squarely addressed in those cases because the taxpayers there had established usual places of employment in the first instance. Thus, those cases are not inconsistent with the decision below.[3]

3. Petitioner further contends that the application of the "away from home" requirement of Section 162(a)(2) and the temporary employment doctrine conflict with *Rosenspan* v. *United States*, 438 F. 2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971), and *Six* v. *United States*, 405 F. 2d 66 (2d Cir. 1971). Any differences, however, may be attributed in large part to the divergent facts of each case. As the court of appeals here noted, Section 162(a)(2) must be interpreted on the basis of the particular facts at hand. The Second Circuit has never considered the application of Section 162(a)(2) to summer employment expenses incurred by a full-time student. There is no basis for petitioner's suggestion that the Second Circuit would reach a different result on the facts of this case. Moreover, it is speculation for petitioner to argue that the court below would disagree with the results in *Rosenspan* or *Six* under similar facts.

Finally, petitioner contends (Pet. 19-23) that the decision below will affect many taxpayers, such as performers and construction workers, who were previously allowed deductions for traveling expenses. There is, however, no basis for

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[3]Petitioner's reliance (Pet. 14) on *Burns* v. *Gray*, 287 F. 2d 698 (6th Cir. 1961), is misplaced. That case involved a racehorse starter who maintained a permanent home in Kentucky and traveled around the country during racing season. His expenses were held to be deductible. That case is an example of the many special rules developed in this area to accommodate the diverse businesses of taxpayers. If a taxpayer is required to travel throughout a large geographical area because of his trade or business, it is evident that the taxpayer cannot live near his place of employment. Travel expenses are deductible in such a situation if the taxpayer maintains one home in a relatively central location. The facts of *Burns* are therefore not comparable.

assuming that the opinion of the court of appeals will be extended to taxpayers other than full-time students.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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